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Before the
United States House of Representatives
Committee on Energy & Commerce
Subcommittee on Consumer Protection and Commerce

Hearing on
“The Consumer Protection and Recovery Act:
Returning Money to Defrauded Consumers”

*The witness appears in his individual capacity.

Chair Schakowsky, Chair Pallone, Ranking Member Bilirakis, Ranking Member Rogers, and Members of the Subcommittee:

My name is Ted Mermin. I direct the Center for Consumer Law and Economic Justice at the UC Berkeley law school. I also run the California Low-Income Consumer Coalition, which works on behalf of legal aid clients, and the Public Good Law Center, which advocates for fairness in the courts and in the marketplace. But the thoughts I share today are my own. Today, I am here as a concerned citizen. Because the agency that is supposed to be protecting me – and my 86-year-old mother, and my teenage daughter, and my former students who are now in the military – from scammers and con artists and financial predators and hackers and tech barons no longer has the tools and resources it needs to do its job.

Last Thursday’s decision by the Supreme Court means that the FTC is now unable to effectively perform its most important consumer protection function: getting money back to the people it has been unlawfully taken from.¹ This is the latest in a series of court decisions that have systematically cut back on the authority of the FTC² and that now collectively mean that the Commission must try to operate with hobbles that are not only unlike any that other agencies – federal or state – must contend with, but that also make no sense for an agency whose work on our behalf is desperately needed.

Fortunately, as the Supreme Court emphasized, Congress can fix the problem.³ Representative Cárdenas’s Consumer Protection and Recovery Act represents a significant – and, now, urgent – step toward re-establishing the Federal Trade Commission as America’s leading consumer protection agency.

¹ Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEG. 37, 69-70 (2018).

² See, e.g., *FTC v. Shire ViroPharma*, 917 F.3d 147 (3d Cir. 2019) (limiting ability to obtain injunctive relief); *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (limiting ability to get monetary relief to victims); *FTC v. AbbVie, Inc.*, 976 F.3d 327 (3d Cir. 2020) (same).

³ “If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.” *AMG Capital Mgmt v FTC*, No. 19-508, 593 U.S. __ (April 22, 2021), slip op. at 14.

I. There is an Acute, Commonsense Need for Congress to Take Action Now.

The fix that is now so pressing is a matter of common sense. Why wouldn't every American want to have an agency to turn to when they are ripped off, when their computer is frozen and held hostage, when their mom is the victim of a pyramid scheme, when a big tech company promises them it will never share their data – and then does? Why wouldn't every member of this committee want to be able to their constituents who call with one of these problems, "Let me put you in touch with the FTC; they may be able to help"? How do you explain to that constituent that you'd like to be able to assist them but unfortunately the FTC can't get them their money back any more?

I want to emphasize that I look at the FTC from the outside – outside the agency and outside the Beltway. Some of my proudest years were spent as a deputy attorney general in a state AG's office. We worked with the FTC. We partnered with the FTC. But we also wondered why the FTC was so under-resourced, and why it couldn't do many of the things that state AGs take for granted.

In consumer protection cases, state AGs rely on a triad of relief in almost every case: first and foremost, restitution and disgorgement – getting people their money back and making sure that the business doesn't get to keep ill-gotten gains; second, injunctive relief – making sure that the business that acted unlawfully is under court order not to do it again, so that enforcement is quicker and more effective; third, fines – requiring the payment of civil penalties to give the business (and its competitors) an incentive not to engage in illegal activity in the first place. We were bemused that the FTC couldn't impose civil money penalties in most cases when the AGs could; we were puzzled when some courts started holding that the FTC couldn't get injunctive relief if the illegal course of conduct had ended. And last week, we were frankly dismayed that the FTC can't now effectively perform the single most basic task of a consumer protection enforcement agency: getting money back to the consumers it was unlawfully taken from.

Where is the logic in underfunding an agency that is responsible for fighting fraud and deception in a majority of the American economy? How can that agency have so many fewer employees than comparable agencies that cover industries responsible

for much smaller segments of the GDP?⁴ More pointedly, how can it have *lost* almost 40% of its positions in the past 40 years, while the GDP grew by 750%?⁵ How can an agency so hobbled accomplish the ever-increasing mission that Congress – and all Americans – have assigned it?

Make no mistake. We need the FTC and we need it at full power – now more than ever. We are emerging from a pandemic that has killed more than half a million Americans and that shut down much of our economy. It will take years for our economy and our society fully to recover – and in the meantime, we can be absolutely certain that scams, robocalls, data breaches resulting in identity theft, and unfair and deceptive practices of all kinds will continue to besiege us. They will especially target seniors, veterans, low-income communities, communities of color, mom-and-pop businesses – the most vulnerable among us.

It is a very good thing that this committee, in bipartisan fashion, made sure that the Consolidated Appropriations Act and COVID 19 Consumer Protection Act last December allocated additional resources and provided civil penalty authority to the FTC for the duration of the public health crisis.⁶

But that authority expires with the pandemic. Why would we not want the FTC to be fully staffed and fully empowered to meet the next emergency, *before* it happens?

The need for public enforcement capacity is acute. The FTC needs to be able to do its job robustly and effectively because the vast majority of Americans cannot afford

⁴ The Consumer Financial Protection Bureau, which provides oversight for one sector of the American economy, has over 1500 employees. The SEC, responsible for another sector, has over 4400. The FTC, which is responsible for industries representing much of the rest of the national GDP, has 1100. *Compare Consumer Financial Protection Bureau, Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview* (Feb. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy19.pdf with Securities and Exchange Commission, *Full Time Equivalents History* (2020), available at <https://www.sec.gov/foia/docs/fulltimes.htm> and *FTC Appropriation and Full-Time Equivalent History*, Federal Trade Commission, available at <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

⁵ See Federal Reserve Economic Data (FRED), GDP, St. Louis Fed (2021), available at <https://fred.stlouisfed.org/series/GDP>; *FTC Appropriation and Full-Time Equivalent History*, Federal Trade Commission, available at <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

⁶ The Consolidated Appropriations Act and the COVID-19 Consumer Protection Act, passed last December, grant additional resources and authority to the FTC to seek civil penalties for unfair and deceptive practices associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 or a government benefit related to COVID-19. See <https://www.ftc.gov/enforcement/statutes/covid-19-consumer-protection-act-2021-consolidated-appropriations-act>

to hire private counsel to assist them in dealing with civil legal problems.⁷ Ninety percent of low-income Americans with civil legal problems report receiving “inadequate or no legal help”; legal aid providers, lacking sufficient resources, have to turn away more than 50% of qualifying consumers seeking legal help.⁸ Most middle-income families also face civil legal problems without counsel, and the pandemic will strain already inadequate pro bono resources for years to come.⁹ Even for consumers with sufficient resources and the wherewithal to find a lawyer in a consumer protection matter, mandatory arbitration and restrictions on class actions have drastically reduced the availability of redress.¹⁰

Public enforcement has, in sum, become the “last line of defense in market protection.”¹¹ And at the head of the agencies providing that enforcement is the Federal Trade Commission.

II. The Consumer Protection and Recovery Act is a Much-Needed Step Toward Providing the FTC With Adequate Authority to Do Its Job.

Restoration and reform starts with the single most important function of any government enforcement agency – federal, state or local – that works to protect consumers: the ability to provide redress to those who have lost money to unfair or deceptive tactics. Those victims receiving relief potentially include every person in this hearing, and every person in your district – seniors, students, servicemembers, small businesses.¹² And of course restitution and disgorgement by businesses acting unlawfully also benefit competitors that want to and do play by the rules.

⁷ Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA at 3-20 (S. Estreicher & J. Radice, eds., 2016).

⁸ LEGAL SERVICES CORPORATION: THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, at 6 (2017); LEGAL SERVICES CORPORATION, FY 2017 BUDGET REQUEST (2016), <https://lsc-live.app.box.com/LSCFY2017BudRequest>.

⁹ Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast Hidden Inequities of the Civil Justice System*, NEW REPUBLIC (June 22, 2020), available at <https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice>.

¹⁰ Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535 (2016) (“class actions brought by or on behalf of low-income consumers and employees are on the verge of disappearing”).

¹¹ Prentiss Cox & Christopher L. Peterson, *Public Compensation for Public Enforcement*, 39 Yale Journal on Regulation (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809786 at 11.

¹² See, e.g., Federal Trade Commission, *At FTC’s Request, Court Permanently Stops A-1 Janitorial Office Supply Scam* (Apr. 11, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/04/ftcs-request-court-permanently-stops-1-janitorial-office-supply>.

Representative Cárdenas’s Consumer Protection and Recovery Act aptly distinguishes between “restitution” (returning to consumers money that was unlawfully taken from them) and “disgorgement” (compelling a business to give up ill-gotten gains), and ensures that the FTC is empowered to seek each.¹³ That is authority held uncontroversially not only by almost all state attorneys general but also by other federal agencies – including, for example, the Commodity Futures Trading Commission.¹⁴

It is necessary to explicitly restore the FTC’s restitution and disgorgement authority. The alternative cumbersome and outdated process set out in Section 19 of the FTC Act – providing for redress only if a “reasonable man” would find the conduct “dishonest or fraudulent,” and then only after an administrative proceeding has concluded¹⁵ – is wholly inadequate to respond to the speed and ingenuity of fraudsters. The definitions of “dishonest” and “fraudulent” are undeveloped and unclear. And the requirement for a complete administrative proceeding before an action for redress can be commenced will be unworkably cumbersome. We don’t ask the FBI to fill out forms in triplicate and conduct a year-long hearing in order to stop a bank robbery in progress.

I know the people who work at the FTC, in Washington and around the country. You could not find a more dedicated, capable group of people, committed to preventing fraud, helping people who have lost their life’s savings, stopping the fraud so that more people don’t get hurt. But these cases take time, and they take resources to do the right way – which is the way the FTC does things. It doesn’t cut corners. That means, however, that requiring an administrative process before the Commission could get relief to consumers would too often result in no relief at all, because the perpetrators will have disappeared, or dissipated or hidden their assets.

Ultimately, the criticisms expressed about the Consumer Protection and Recovery Act amount to a curious distrust of the FTC. The proposed alternatives would enact further limitations on an already hobbled agency. What remains unexplained – and very difficult to understand to the great majority of the 330 million consumers in the United States who seek *more* protection from fraud and deception, not less – is

¹³ Cox & Peterson, *supra* note 11, at 23 (“State courts typically use the term restitution and the concept of consumer loss as a measure of relief regardless of the nomenclature in the underlying statutory authority.”)

¹⁴ Dee Pridgen & Richard Alderman, CONSUMER PROTECTION AND THE LAW app. 7A (2016-17) (every state but New Mexico has some form of statutory authority for consumer restitution); 7 U.S.C. § 13a-1(d)(3). *Commodity Futures Trading Comm’n v. JBW Capital*, 812 F.3d 98, 111 (1st Cir. 2016).

¹⁵ 15 U.S.C. §57b.

exactly why they should fear a robust agency dedicated to protecting their money. State AGs have had the authority proposed in the CPRA – and more – for decades. The political process and the court system have apparently managed to keep the AGs in line. And in the meantime, they have returned billions of stolen dollars to consumers.

To equip the FTC properly to do its job is a straightforward task, and a serious responsibility of this committee. The Consumer Protection and Recovery Act represents a sensible step forward toward restoring essential protections for all Americans.

III. 10 Things This Committee, and This Congress, Can Do to Give the FTC the Tools It Needs to Do Its Job.

The Consumer Protection and Recovery Act advances the first two critical improvements to the FTC Act listed below. But the task before this committee is broader than simply filling the void left by the Supreme Court’s decision last week. The following suggestions – all endorsed in various forms by bipartisan cohorts of FTC commissioners, and all supported by broad coalitions of advocates for consumers, small businesses, veterans, and seniors – would restore the FTC to its rightful and logical position as the nation’s leader in consumer protection.

- 1. Restore the FTC’s authority to get money back to consumers from whom it was unlawfully taken.** This most salient fix is critical to the functioning of the FTC as a consumer protection agency.
- 2. Give the FTC full authority to obtain an injunction barring future misconduct.** A court order barring the conduct that the FTC has gone to such pains to investigate and prove is a vital part of the toolbox of the Commission or any consumer protection agency. A thief who takes your wallet may end up closely monitored on probation or, after prison, on parole – whether or not he had stopped taking wallets by the time he was caught. When a business steals your money, it too should be subject to additional supervision, with quicker enforcement.
- 3. Provide the FTC with the default ability to require the payment of civil penalties.** Give businesses and individuals who are inclined to break the law a reason not to do so. Routine civil penalty authority is exercised by state Attorneys General – and in some states local government authorities – in almost all the cases

that they bring.¹⁶ It is common sense to ensure that the FTC is able to make use of the same tools as its state and local counterparts.

4. **Establish a Civil Penalty Fund dedicated to providing compensation to victims of unfair and deceptive business practices who cannot be repaid by the businesses or individuals that harmed them.** All too often, scam artists spend the money they steal from consumers. By the time the FTC can fully prosecute a case, the judgment – frequently for an impressively large amount of restitution – must be suspended because of the defendants’ inability to pay.¹⁷ There is a way around this dilemma: Congress can grant the FTC authority to set up a Civil Penalty Fund or Consumer Redress Fund to provide a source of relief to victims, funded by civil penalties collected in other cases. The CFPB has exercised this type of fund effectively and with great benefit to consumers.¹⁸ This fund could also receive funds paid pursuant to an order to disgorge illegally-obtained money when it is not practicable to return those funds to consumers.

5. **Give the FTC the same ability to make rules that is exercised by other federal agencies.** Rulemaking under the Administrative Procedures Act provides all stakeholders the ability to express their views, and requires the agency to consider those views. And unlike the Commission’s current sclerotic Magnusson-Moss rulemaking authority, the proceedings will not be so delayed that the rule is likely to be outdated by the time it is finally issued.

6. **Fully fund the FTC so that it may effectively play its role as the nation’s consumer protection agency.** As former Commissioner William Kovacic explained at a hearing before this subcommittee in February, the FTC cannot accomplish the mission that Congress has set for it without a significant infusion of resources.¹⁹ That money is a wise investment: far greater sums will be

¹⁶ “[C]ivil penalties, akin to fines, are available to public enforcers in almost all cases.” Cox and Peterson, *supra* note 11, at 5; *see also* Cox et al., at 73-74 (state attorneys general obtain civil penalties or other forms of government payment in 73% of cases).

¹⁷ *See, e.g.*, Federal Trade Commission, *FTC Puts an End to Deceptive Advertising of Light Therapy Device* (June 5, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-puts-end-deceptive-advertising-light-therapy-device>

¹⁸ *See* Craig Cowie, *Putting Money Back Into Consumers’ Pockets: An Empirical Study of the CFPB’s Civil Penalty Fund*, __ U. ILL. L. REV. (forthcoming 2021), available at <https://ssrn.com/abstract=3537984>.

¹⁹ Testimony of William E. Kovacic to the House Subcommittee on Consumer Protection and Commerce, *Safeguarding American Consumers: Fighting Frauds and Scams During the Pandemic* (Feb. 4, 2021), available at <https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-KovacicW-20210204.pdf>.

returned to consumers and small businesses, and received from customers by competitors who play by the rules.

7. **Give the FTC general authority to prevent price gouging in emergencies.** This is a power currently held by the states and exercised by attorneys general across the nation.²⁰ Providing the FTC the same authority would add measurably to the nation’s ability to respond to natural disasters and other emergencies; these events are too frequent to make it feasible for Congress to pass separate legislation each time one occurs.

8. **Provide the FTC authority over common carriers.** When the common carrier exemption was included in the FTC Act more than 100 years ago, it was logical to exempt the monopoly providers of common carrier services, who were not disciplined by competition but rather by detailed rate and service regulation. Since that time, the telecommunications industry and the regulatory role of the federal government have changed dramatically. As the Ninth Circuit observed three years ago, the FTC Act already allows the Commission to regulate common carriers’ non-common-carriage activities.²¹ This extension of the FTC’s jurisdiction would permit the “leading federal consumer protection agency”²² to take on widespread consumer protection issues that are in need of further attention, including data breaches, privacy and robocalls.

9. **Give the FTC authority over non-profit corporations.** The Internal Revenue Service has nominal authority now, but its purview is limited essentially to whether a tax-exempt organization should be able to maintain that status. Given the widespread business activities of nonprofit corporations like hospital chains, and all-too-common examples of unfair or deceptive conduct by charitable organizations, this extension would close an important gap in FTC protection, including in oversight of data security and privacy practices.

10. **Trust the FTC.** This final step informs all the others. There can be no doubt that there is more work to do protecting consumers than the FTC currently has the tools or resources to accomplish. There is also no doubt that the FTC has been trammled in ways that its sister agencies, federal and state, have not. Whatever the reason, it is high time to retire the “zombie ideas” about the FTC – that the

²⁰ See King & Spaulding, *COVID-19 Survey of Federal and State Price Gouging Laws* (2021), available at <https://www.kslaw.com/pages/covid-19-survey-of-federal-and-state-price-gouging-laws>

²¹ *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018) (en banc).

²² *Id.* at 851.

Commission is unnecessary, or overreaching, or heavy-handed, or inefficient.²³ It is time, as one commissioner stated in Senate testimony last week, to “turn the page on the FTC’s perceived powerlessness.”²⁴

For an American public eager for greater – not lesser – protection from increasingly sophisticated scam artists, deceptive advertisers, and privacy violating tech companies, building an effective FTC is an easy decision. It can and should be for this committee as well.

IV. Conclusion

This subcommittee meets at a remarkable historical moment, when the COVID-19 pandemic has revealed the profound need for a robust Federal Trade Commission just days after the Supreme Court made action by Congress an absolute necessity. This is a perilous time, with the chief protector of American consumers rendered nearly powerless just when those consumers are experiencing a heightened threat resulting from a once-in-a-century pandemic. The Consumer Protection and Recovery Act provides a critical first step toward restoring authority and effectiveness to the nation’s leading consumer protection agency.

Swift action to restore the FTC’s traditional 13(b) authority means that when constituents contact your office, and tell your staff that they have lost their life’s savings to a work-at-home scam, or their identity has been stolen and someone has opened accounts in their name, or they just spent their stimulus payment on a supposed cure for COVID for their grandmother who’s on a respirator – there will still be an agency to refer them to. No one wants that staffer to have to add: “Well, we could send you to the FTC, but they don’t actually have the power to get you your money back.”

Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

Thank you for your time and consideration.

²³ Chris Jay Hoofnagle, FEDERAL TRADE COMMISSION: PRIVACY LAW AND POLICY 351 (2016) (describing ideas about the FTC that have little basis in reality but have nonetheless persisted over time).

²⁴ *Strengthening the Federal Trade Commission’s Authority to Protect Consumers*, U.S. Senate Committee on Commerce, Science, & Transportation (Apr. 20, 2021) (statement of Commissioner Chopra).

Respectfully submitted,

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